Supreme Court, U.S.
FILED
FEB 2 2001
CLERK

(2)

No. 00-1074

IN THE

Supreme Court of the United States

CHRIS NIEMEYER and JASON NIEMEYER,

Petitioners,

v.

OROVILLE UNION HIGH SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

CHRISTIAN MARK KEINER
Counsel of Record
MICHELLE CANNON
LAURA LEE BRIGGS
ANNE SHERLOCK
GIRARD & VINSON
Attorneys for Respondents
1006 Fourth Street
Eighth Floor
Sacramento, CA 95814-3326
(916) 446-9292

164909

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

39 pp

QUESTION PRESENTED

1. Whether public school educators are entitled to immunity from money damages when disapproving sectarian and proselytizing high school graduation speech pursuant to the "compelling state interest" in compliance with the First Amendment, Establishment Clause.

THE PARTIES

The School District respectfully asserts the only proper petitioners are Chris Niemeyer and Jason Niemeyer for purposes of 42 U.S.C. § 1983 alleged damage claims. Petitioners claim as proper parties Chris Niemeyer and Jason Niemeyer, who were Plaintiffs and Appellants in the District Court and Ninth Circuit Court of Appeals. Petitioners also claim as proper parties other Appellants in the Court of Appeals, who were dismissed by both the Court of Appeals and the District Court as lacking standing to bring their claims.

Respondents are the Oroville Union High School District ("School District"); Barry Kayrell, individually and as Superintendent of the Oroville Union High School District; Larry Payne, individually and as Principal of Oroville Union High School; Jeff Plotnick, individually and as Vice-Principal of Oroville Union High School ("School Officials"); David Bruce, Roy Fisher, Kenneth Harlan, Susan Neben, Lillaine Speese, as members of the governing board of Oroville Union High School District. These Respondents were both Defendants and Appellees below. (Because all Defendants/Appellees were held to be immune from damage claims, Respondents see no reason to now single out any one individual defendant in the case caption.)

TABLE OF CONTENTS

	Page
Question Presented	i
The Parties	ii
Table of Contents	iii
Table of Cited Authorities	v
Relevant Constitutional Provisions	1
Statement of the Case	2
A. Introduction.	2
B. Procedural History.	3
C. Brief Statement of Facts.	5
Reasons for Denying the Writ	9
A. There Is No Conflict Among the Circuits Regarding Graduation Ceremonies.	9
B. Equitable Claims Remain Moot and No Petitioner Has Equitable Relief Standing.	13
C. There Is No Basis to Revive Damage Claims in this Matter.	15

Contents

Page

1. There Was No Potential Deprivation of Constitutional Rights in These Circumstances. 16

2. There Was No "Clearly Established" Right During the Time Period At Issue. 17

D. The Contours of the Right for First Amendment Free Speech Analysis Must Include *Hazelwood*, Which Permits Administrative Limitations on Speech. 20

E. Petitioners' Proposed Student Right to "Religious Invitation" Was Not Raised Below and is Contrary to Public School Precedent. 22

Conclusion 26

TABLE OF CITED AUTHORITIES

Page

Cases:

ACLU v. Black Horse Pike Reg'l. Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996) 9, 11

Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987) 18, 19

Baxter by Baxter v. Vigo County Sch. Corp., 26 F.3d 728 (7th Cir. 1994) 18

B.C. by and through Powers v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9th Cir. 1999), *amended* by 1999 WL 958926 ..... 14, 18, 19

Bennett v. Livermore Unified Sch. Dist., 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987) 17, 21

Berger v. Rennselaer Cent. Sch. Corp., 982 F.2d 1160 (1993) 24

Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 106 S. Ct. 3159 (1986) 20, 24

Bigelow v. Virginia, 421 U.S. 809, 95 S. Ct. 2222 (1975) 14

Brewster v. Board of Educ., 149 F.3d 971 (9th Cir. 1998) 15, 18, 19

Cited Authorities

Page

Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1940) 23

Ceniceros by & through Risser v. Board of Trustees, 106 F.3d 878 (9th Cir. 1997) 14

Chandler v. James, 180 F.3d 1254 (11th Cir. 1999) 10, 11, 12, 13

Chandler v. Siegelman, 230 F.3d 1313 (11th Cir. 2000) 9, 10, 11, 12, 13

Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092 (9th Cir. 2000) 4, 5, 9, 10, 11, 13, 15, 17

Coles by Coles v. Cleveland Bd. of Educ., 171 F.3d 369 (6th Cir. 1999), *rehearing and en banc review denied*, 183 F.3d 538 (1999) 10

Collins v. Chandler Unified Sch. Dist., 644 F.2d 759 (9th Cir. 1981), *cert. denied* 454 U.S. 863, 102 S. Ct. 322 (1981) 10, 24

County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708 (1998) 15, 16, 17, 19

Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995) 10

Cited Authorities

Page

Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832 (9th Cir. 1998), *vacated and remanded,* 177 F.3d 789 (9th Cir. 1999) *opinion withdrawn, review, or rehearing granted,* 1999 U.S. App. LEXIS 5051 (9th Cir. 1999) 14

Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir. 1999), *affirmed on other grounds,* 530 U.S. 290, 120 S. Ct. 2266 (2000) ..... *passim*

Edwards v. Aguillard, 482 U.S. 578, 107 S. Ct. 2573 (1987) 16, 24

Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261 (1962) 16

F.C.C. v. Pacifica Found., 438 U.S. 726, 98 S. Ct. 3026 (1978) 24

Fowler v. Rhode Island, 345 U.S. 67 73 S. Ct. 526 (1953) 23

Friends of the Earth Inc. v. Laidlaw Envtl. Servs. (TOL) Inc., 528 U.S. 167, 120 S. Ct. 693 (2000) 14

Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495 (1988) 24

Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308, 119 S. Ct. 1961 (1999) 23

Cited Authorities

Page

Guidry v. *Broussard*, 897 F.2d 181 (5th Cir. 1990) 9

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982) 15, 18, 19

Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), *cert. granted, vacated, and remanded*, 515 U.S. 1154, 115 S. Ct. 2604 (1995), *on remand*, 62 F.3d 1233 (1995) 14

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562 (1988) 3, 4, 19, 20, 21, 22

Hurley v. Irish-American Gay & Lesbian & Bisexual Group, 515 U.S. 557, 115 S. Ct. 2338 (1995) ... 24

Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461 (1948) 24

Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989) 10

Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992) 9

Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649 (1992) 4, 9, 11, 16, 17, 22, 23

Lehman v. Shaker Heights, 418 U.S. 298, 94 S. Ct. 2714 (1974) 24

Cited Authorities

	Page
Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971)	16, 17
Lopez v. Tulare Joint Union High Sch. Dist., 34 Cal. App. 4th 1302, 40 Cal. Rptr. 2d 762 (1995)	21
Los Angeles v. Lyons, 461 U.S. 95, 103 S. Ct. 1660 (1983)	14
Maciariello v. Sumner, 973 F.2d 295 (4th Cir. 1992)	18
Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 114 S. Ct. 2516 (1994)	24
McDade v. West, 223 F.3d 1135 (9th Cir. 2000)	15
Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996)	24
N.C.A.A. v. Smith, 525 U.S. 459, 119 S. Ct. 924 (1999)	23
Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994)	10
Perumal v. Saddleback Valley Unified Sch. Dist., 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 (1988)	21

Cited Authorities

Page

Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364 (1991) 14

Roberts v. Galen of Virginia, Inc., 525 U.S. 249, 119 S. Ct. 685 (1999) 23

Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990) 10

Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 115 S. Ct. 2510 (1995) 23, 24

Rowan v. U.S. Post Office Department, 397 U.S. 728, 90 S. Ct. 1484 (1970) 24

Sands v. Morongo Unified Sch. Dist., 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991), *cert. denied* 505 U.S. 1218, 112 S. Ct. 3026 (1992) 17

School Dist. of Abington v. Schempp, 374 U.S. 203, 83 S. Ct. 1560 (1963) 10

Singleton v. Wulff, 428 U.S. 106, 96 S. Ct. 2868 (1976) 14

Spencer v. Kemna, 523 U.S. 1, 118 S. Ct. 978 (1998) 14

Cited Authorities

Page

Stein v. Plainwell Community Sch., 822 F.2d 1406 (6th Cir. 1987) 9

Stone v. Graham, 449 U.S. 39, 101 S. Ct. 192 (1980) 16

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 89 S. Ct. 733 (1969) 20, 22

Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2479 (1985) 16

Widmar v. Vincent, 454 U.S. 263 (1981) 24

Wilson v. Layne, 526 U.S 603, 119 S. Ct. 1692 (1999) 15, 17, 18, 19

Wood v. Strickland, 420 U.S. 308, 95 S. Ct. 992 (1975) 19

United States Constitution:

First Amendment ..... *passim*

Fourth Amendment 18

Statutes:

California Education Code section 48907 21

42 U.S.C. § 1983 ..... ii, 9, 15, 26

Cited Authorities

Page

Other Authorities:

California Constitution Article I, Section 4 ..... 1, 17

California Constitution Article IX, Section 8 .... 1, 2, 17

California Constitution Article XVI, Section 5 .. 1, 2, 17

Respondents Oroville Union High School District; Barry Kayrell, individually and as Superintendent of the Oroville Union High School District; Larry Payne, individually and as Principal of Oroville Union High School; Jeff Plotnick, individually and as Vice-Principal of Oroville Union High School; David Bruce, Roy Fisher, Kenneth Harlan, Susan Neben, Lillaine Speese, as members of the governing board of Oroville Union High School District (collectively "Respondents") respectfully request that the petition for writ of certiorari be denied. Petitioners would have this Court set aside well-established precedent involving mootness, standing, immunities, and the First Amendment's Free Speech and Establishment Clauses as applied in the nation's public schools.

RELEVANT CONSTITUTIONAL PROVISIONS

The relevant constitutional provisions are the Free Speech and Establishment Clauses of the United States Constitution, First Amendment, which state in pertinent part: "Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech . . ." Also relevant are the California Constitution, Article I, Section 4; Article XVI, Section 5; and Article IX, Section 8, which state in pertinent part as follows:

Article I, Section 4:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion.

Article XVI, Section 5:

> Neither the Legislature, nor any . . . school district . . . shall ever . . . grant anything to or in aid of any religious sect, church, creed, or sectarian purpose. . . .

Article IX, Section 8:

> No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.

STATEMENT OF THE CASE

A. Introduction.

This matter involves Petitioners' attempt to revive money damage claims against Respondents' school board members, and School Officials who met their obligations to maintain decorous and lawful public high school graduation ceremonies. Acting with advice of legal counsel, the School Officials disapproved sectarian and proselytizing graduation speech in ceremonies over which the School District retained plenary control. Co-valedictorian and Petitioner Chris Niemeyer admittedly proposed to testify, witness, or preach from the public podium to a 1998 California public high school graduation audience. The method used in his proposed graduation expression was repetitious "we messages"

directed to the entire audience, e.g., "[w]e are all God's children, through Jesus Christ's death, when we accept His free love and saving grace in our lives. . . ," or "[a]s individuals, we have a choice of whether to choose His perfect will in our lives or our own futile plans"; and he concluded with a call to action addressed to the entire audience that "I encourage you to accept God's love and grace. We must yield to God our lives and let Him direct our future paths. For with God, you will find eternal happiness and absolute success in all that you do." *Supplemental Excerpt of Record* (hereinafter "*SER*") at 188-189; App. G at G1-G3.[1] This religious testimonial would have occurred despite the objections of at least the 1998 Oroville High School co-valedictorian and her family.

B. Procedural History.

The Petitioners' description of the timing and procedural results of the court decisions below is accurate. *Petition* at 5-8. However, the Petition omits certain key substantive grounds for the rulings of the trial and appellate courts germane to Petitioners' "questions presented." First, the trial court in dismissing all damage claims on the basis of qualified immunity set the "contours of the right" pursuant to the First Amendment and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988) ("*Hazelwood*"), App. D at D2-D3. The trial court next held that "[i]n this case, defendants' actions were reasonably

---

1. All such references are to the School District's Statement of Undisputed Facts ("Undisputed Facts") as set forth in the Supplemental Excerpts of Record ("SER") before the appellate court, unless otherwise noted. The Petitioners' Appendix herein is referred to as "App."

related to the legitimate pedagogical concern of conducting a graduation ceremony which did not offend or intrude upon the religious sensibilities of other students." App. D at D4. The trial court ruled that Petitioners had failed to demonstrate a "clearly established" right pursuant to the First Amendment. App. D at D4. When subsequently ruling upon the equitable claims, the trial court held that the School District's tendered justification sufficed under *Hazelwood*, 484 U.S. 260, App. C at C17. The trial court in that conclusion also noted that "plaintiffs' proposed speech would convey as sectarian a message as the prayer in *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. Tex. 1999), and thus permitting its delivery would equally implicate the Establishment Clause." App. C at C17-C18.[2]

Second, due to the procedural lack of standing and mootness of claimed equitable relief, the appellate court primarily framed its substantive analysis upon the claimed money damages and immunity issues. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1101-1104 (9th Cir. 2000) ("*Cole*"), App. A at A14-A23. The Ninth Circuit panel carefully applied this Court's public school precedent in *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992) (school district invitation to clergy to deliver graduation invocation violates Establishment Clause) ("*Lee*"), and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S. Ct. 2266 (2000) (school district policy allowing students to deliver

---

2. With respect to Jason Niemeyer, both parties stipulated it was sufficient for the trial court to rule on the basis that: "I have a pleading, which apparently everybody agrees Jason proposes a sectarian speech, something along the lines of his brother's proposed speech." *SER* at 236-238; *RT* of May 27, 1999, p. 23, lines 2-12, App. C at C12.

nonsectarian and nonproselytizing invocation or statement to solemnize football games violates Establishment Clause) ("*Santa Fe Indep. Sch. Dist.*"). *Cole*, 228 F.3d at 1101-1104, App. A at A14-A23. The appellate court concluded that the "District officials acted reasonably to avoid violating the Establishment Clause," to affirm immunity. *Cole*, 228 F.3d at 1105, App. A at A23. The Petitioners did not bring any claimed error to the Ninth Circuit's attention by way of petition for rehearing or rehearing en banc.

C. Brief Statement of Facts.

The Petitioners' factual description omits key facts. *Petition* at 3-5. The Petitioners' Statement of the Case unfortunately ignores the real life religious conflict confronting the School Officials and misstates the undisputed facts before the trial and appellate courts. *Petition* at 3-5. The trial court relied upon undisputed facts and very briefly summarized facts taken from the statements of undisputed facts filed by the parties. *SER* at 240-242, App. C at C1-C5. The appellate court in its de novo review did the same. *Cole*, 228 F.3d at 1096-1097, App. A at A4-A7. The trial court held as a factual matter the School District retained and exercised the right to approve all speech proposed to be delivered at Oroville High School. *SER* at 240-242, App. C at C1-C5. The appellate court determined the School District retained plenary authority over the graduation ceremony to include student speech. *Cole*, 228 F.3d at 1103, App. A at A19. The School District will very briefly set forth certain other key undisputed facts regarding School District graduation ceremonies.[3]

---

3. The School District's entire statement of undisputed facts is set forth as Appendix J to the Petition.

The Principal at each high school within the School District has primary responsibility for supervising all aspects of the graduation ceremonies. *SER* at 23, Undisputed Facts #24, App. J at J10. Students and their parents or guardians sign a behavior contract to attend any OUHSD graduation. *SER* at 5, Undisputed Facts #25, App. J at J10. The Oroville High School graduation is held upon School District-owned property and public funds are expended on the ceremony. *SER* at 5, Undisputed Facts #27, App. J at J10. Most speeches during Oroville High School graduations have been traditionally delivered by students. Prior to approximately 1985, the senior class selected the student speakers for the Oroville High School graduation who spoke without administrative review. Due to concerns about the quality of speeches and crowd decorum, the then-principal in approximately 1985 instituted the current system by which all speech at the Oroville High School graduation ceremony is reviewed by the high school secretary; retyped; then reviewed and approved by the vice principal or principal. The Senior Class Advisors and Senior English Instructor first assist the speakers in drafting their remarks. *SER* at 6, 26-28, Undisputed Facts #7-8, 36-46, 51-54, App. J at J3-J4, J15-J17, J19-J21. In 1998, senior class advisors and teachers Jason Becker and Kim Koslin-Scott told student speakers that the speeches had to be nondenominational and Koslin-Scott described "nondenominational" as inclusive of the religious beliefs of everyone. Koslin-Scott gave an example of a person not being able to practice Buddhist beliefs in a speech and intended for the speeches to be nonoffensive to the entire audience. *SER* at 26, Undisputed Facts #37. Speech is placed in the "graduation book," a compilation of all approved speeches placed at the podium in a binder. *SER* at 5, Undisputed Facts #28, App. J at J11-J12.

When Chris Niemeyer (and Ferrin Cole)[4] were chosen to present, the 1998 Co-Valedictorian Delisa Freistadt was concerned that they might try to use the graduation ceremony as an opportunity to recruit others to their religious views. Freistadt is Jewish and her concerns were based on the fact that Niemeyer (and Cole) were leaders in a student religious club that she perceived was trying to proselytize students by handing out free hot cocoa on cold mornings and pizza at lunch with religious pamphlets and bibles. *SER* at 27, Undisputed Facts #47, App. J at J17-J18. Freistadt shared her concerns with her father, Dr. Hans Freistadt, who sent a letter objecting to reference to Jesus during graduation on her behalf to Payne dated May 4, 1998. *SER* at 27, Undisputed Facts #48, App. J at J18. Both Payne and Superintendent Barry Kayrell specifically considered Freistadt's letter in their decision-making process. *SER* at 27, Undisputed Facts #49, App. J at J19.

Chris Niemeyer's proposed speech is set forth as Appendix G to the Petition. Although Chris Niemeyer was aware that School District Senior Class Faculty Advisors Jason Becker, Kim Koslin-Scott, and Senior English teacher Mark McKinnon had expressed a desire to assist him with his speech, *SER* at 29, Undisputed Facts #66, App. J at J24, Chris Niemeyer intentionally did not share his proposed speech with them or Delisa Freistadt because of the content of his speech and because he knew that they did not share the same convictions that he does, as far as faith. *SER* at 29, Undisputed Facts #67, #69, App. J at J24. The fact that there would be a mixed audience of believers and nonbelievers

---

4. Petitioners do not raise any claim regarding Ferrin Cole's proposed invocation and Mr. Cole is not a party to this Petition. *Petition* at 5, n.4. The School District no longer permits any invocations. *SER* at 191.

during graduation did not have a huge impact on Chris Niemeyer while he was drafting his speech because of his "convictions from God to share the speech He had given me." *SER* at 30, App. J at J25. The purpose of Chris Niemeyer's speech was to praise God and the speech "glorifies Him through the words." *SER* at 30, Undisputed Facts #73, App. J at J25. Chris Niemeyer agreed that statements such as "we are here to pattern our lives after Jesus's example" are a form of "testimony" and "witnessing" as described by Chris Niemeyer. *SER* at 30, Undisputed Facts #77, App. J at J26. Chris Niemeyer's draft speech(es) contain many Christian concepts which are uniquely Christian and which are not universally held in all religions. *SER* at 30, Undisputed Facts #78, App. J at J26. If as a result of Chris Niemeyer's speech(es) someone found Jesus or God, Chris Niemeyer believes that would have been a "good result." *SER* at 39, Undisputed Facts #79, App. J at J26. Chris Niemeyer agrees that the speech could be "preaching" if "preaching" is defined as "testifying" or "witnessing," because "[t]hat's witnessing, witnessing of what God has done in my life, what He can do for others." *SER* at 31, Undisputed Facts #84, App. J at J28.

The proposed religious expression was not approved by the School Officials, after a series of meetings with Chris Niemeyer, and advice of legal counsel. *SER* at 31-34, Undisputed Facts #85-106, App. J at J28-J35. Chris Niemeyer's speech, as Principal Larry Payne saw it, would have attempted to violate the standards of the United States Constitution, the separation of church and state; it was religious in nature throughout its theme, it was not directed in the spirit of the graduation, instead it was an attempt to convert people to Niemeyer's way of thinking as far as church was concerned. *SER* at 46, App. J at J31. Freistadt ultimately

was relieved that the trial court did not force her to listen to Chris Niemeyer's speech. Freistadt believes she should have been able to graduate as co-valedictorian of her class without being subjected to offensive religious proselytizing. *SER* at 34, Undisputed Facts #110, App. J at J36.

REASONS FOR DENYING THE WRIT

A. There Is No Conflict Among the Circuits Regarding Graduation Ceremonies.

Petitioners attempt to create a conflict between the Ninth Circuit decision in *Cole* and the decision of the Eleventh Circuit in *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000) ("*Chandler II*"). *Petition* at 10-14. However, the federal circuits have rejected student sectarian prayer and/or proselytizing speech in the specific context of public high school graduation ceremonies.[5] Similar restrictions in public

---

5. *See Stein v. Plainwell Community Sch.*, 822 F.2d 1406 (6th Cir. 1987) (Sixth Circuit pre-*Lee* upheld nonsectarian or nondenominational public high school graduation invocations, but concluded the specific language therein was expressly Christian and unconstitutional); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992) ("*Jones II*") (board policy may allow seniors to choose student volunteers to deliver only nonsectarian, nondenominational prayer); *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999), *affirmed on other grounds*, 530 U.S. 290, 120 S. Ct. 2266 (2000) (reiterates no sectarian or proselytizing speech during graduation ceremonies); *ACLU v. Black Horse Pike Reg'l. Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (senior class determining whether to include prayer not permissible) ("*Black Horse Pike*"); *Guidry* v. *Broussard*, 897 F.2d 181 (5th Cir. 1990) (summary judgment in favor of a school board upheld in a 42 U.S.C. section 1983 when principal had allegedly censored the religious valedictorian address by the student).

schools apply outside the graduation ceremony.[6] As recently noted by the Sixth Circuit in *Coles*, 171 F.3d at 377: "The Supreme Court's Establishment Clause jurisprudence has been remarkably consistent in sustaining virtually every challenge to government-sponsored religious expression or involvement in the public schools." The Ninth Circuit's *Cole* decision is in accord with this solid line of circuit case law.

Nor is there a conflict between the Ninth Circuit decision in *Cole* and the subsequent Eleventh Circuit decision in *Chandler II*, or *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999) ("*Chandler I*"), as reinstated in *Chandler II*. *Cole* involves a California public school graduation ceremony in which the school district retained plenary control over the ceremony, to include faculty advisers working with student

---

6. *See Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981), *cert. denied* 454 U.S. 863, 102 S. Ct. 322 (1981) ("*Collins*") (presentation by students of prayer and bible verses at the opening of student assembly violates the Establishment Clause); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994) (school district restriction on high school teacher's discussions with students about religion during school day and attempts to teach creationism held valid district regulation of curriculum); *Coles by Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999), *rehearing and en banc review denied*, 183 F.3d 538 (school board may not begin meetings with invocation); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (district employees and students participating in student prayers during basketball practices and games impermissible); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (school district order requiring fifth grade teacher refrain from reading bible in presence of students and remove religious books made available to students from classroom library held permissible); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989) (district practice of opening football games with prayer unconstitutional).

speakers and prior administrative approval of all speech. *Cole*, 228 F.3d at 1096-1097, App. A at A4-A6, App. J at J10-J21.[7] In both *Chandler I* and *Chandler II* the Eleventh Circuit vacated portions of what it considered an overbroad permanent injunction issued by the trial court:

> [W]hich assumed that virtually any religious speech in schools is attributable to the State. While the district court recognized that a student must be allowed to pray silently while in school, or even discuss his religious beliefs quietly with others, it enjoined the school district from permitting any prayer in a public context at any school function. We held that this injunction was overbroad to the extent that it equated all student religious speech in any public context at school with State speech. In so doing, it eliminated any possibility of private student religious speech under any circumstances other than silently or behind closed doors. This the Constitution neither requires nor permits. *Chandler II*, 230 F.3d at 1316 (footnote omitted) (emphasis omitted).

---

7. This Court has itself recognized that educators retain a significant degree of control over all aspects of a public high school graduation ceremony stating that: "[a]t a high school graduation, teachers and principals must and do retain a high degree of control over the precise *contents of* the program, *the speeches*, the timing, the movements, the dress, and the decorum of the students." *Lee*, 505 U.S. at 597 (emphasis added). Other federal circuits have emphatically held a public high school graduation ceremony is a "nonpublic" forum. *Black Horse Pike*, 84 F.3d at 1478; *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d at 822, *affirmed on other grounds*.

The Eleventh Circuit in *Chandler II* repetitiously recognized this Court's holding in *Santa Fe Indep. Sch. Dist.* that State-sponsored coercive speech is forbidden by the Constitution, and so in distinguishing private speech did not rule upon official public school-sponsored activities such as a graduation ceremony.[8] In *Chandler I*, the Eleventh Circuit did recognize that: "On the other hand, even genuinely student-initiated religious speech may constitute state action if the State participates in *or supervises the speech*." *Chandler I*, 180 F.3d at 1264 (emphasis added and omitted) (citation omitted). The Eleventh Circuit concluded that:

> Furthermore, a student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for

---

8. The Eleventh Circuit stated, "*Santa Fe* is limited to the issue of school-sponsored student speakers over public address systems at official school events. The activities prohibited by the Permanent Injunction entered in *Chandler I* are far more extensive." *Chandler II*, 230 F.3d at 1315, n. 2. "Because the prayers [in *Santa Fe*] bear the imprint of the State, they cannot be characterized as 'private' speech protected by the Free Exercise and Free Speech Clauses." *Id.* at 1315.

> The Court [in *Santa Fe*] held: [¶] The delivery of such a message — over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer — is not properly characterized as "private" speech. [¶] Since the religious speech produced by Santa Fe's policy is sponsored by and, therefore, attributable to the school, it constitutes an unconstitutional endorsement of religion by the State.

Id. at 1315-16 (citations omitted) (emphasis omitted).

> converting his audience. ***The Constitution requires that schools permit religious expression, not religious proselytizing***. "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." ***Proselytizing speech is inherently coercive and, the Constitution prohibits it from the government's pulpit. Chandler I***, 180 F.3d at 1265 (citations omitted) (emphasis added).

Thus, the Eleventh Circuit in *Chandler I* and *Chandler II* repetitiously recognized the distinction between genuinely private student speech, and speech sponsored by the school during official school activities. The Eleventh Circuit in *Chandler I* itself recognized the Constitution prohibits proselytizing student speech from the government's pulpit. Whatever the merits, or breadth of *Chandler I* and *II*, neither decision extends to proselytizing speech during public high school graduation ceremonies over which a public school district retains plenary control. There is no split among the circuits, or between the Eleventh and Ninth Circuits in *Chandler* and *Cole* regarding graduation ceremonies.

B. Equitable Claims Remain Moot and No Petitioner Has Equitable Relief Standing.

Due to the clear-cut mootness and lack of standing to pursue equitable remedies, the only conceivable issues presented by this matter involve damage claims and immunities. The mootness and standing rulings of the trial and appellate courts were in accord with this Court's and

previous Ninth Circuit precedent.[9] *Los Angeles v. Lyons*, 461 U.S. 95, 101-102, 103 S. Ct. 1660 (1983); *Friends of the Earth Inc. v. Laidlaw Envtl. Servs. (TOL) Inc.*, 528 U.S. 167, 120 S. Ct. 693, 703, 704 (2000); *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S. Ct. 978 (1998); *Singleton v. Wulff*, 428 U.S. 106, 112, 96 S. Ct. 2868 (1976); *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364 (1991); *Bigelow v. Virginia*, 421 U.S. 809, 816-817, 95 S. Ct. 2222 (1975). It has now been almost three years since Chris Niemeyer, and two years since Jason Niemeyer, graduated from Oroville High School. Each has long ago lost any personal stake in equitable relief pursuant to existing precedent. Moreover, it is entirely speculative whether any of the underclass students who seek now to join the case will even attend or speak at a graduation ceremony in the School District.

Petitioners do not squarely offer a "question presented" which raises such a momentous change in mootness and standing law, but only by footnote obliquely invite this Court to consider declaratory or injunctive relief and grant standing on *jus tertii* status to a variety of Petitioners. *Petition* at 1, n.1; 7, n.5. Consideration of these equitable or standing issues now would open the federal courthouse doors for the nation's high school alumni to maintain equitable relief claims, or

---

9. *See B.C. by and through Powers v. Plumas Unified Sch. Dist.*, 192 F.3d 1260 (9th Cir. 1999), *amended* by 1999 WL 958926 (hereinafter "*B.C.*"); *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998), *vacated and remanded*, 177 F.3d 789 (9th Cir. 1999) *opinion withdrawn, review, or rehearing granted*, 1999 U.S. App. LEXIS 5051 (9th Cir. 1999); *Ceniceros by & through Risser v. Board of Trustees*, 106 F. 3d 878, 879, n.1 (9th Cir. 1997); *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994), *cert. granted, vacated, and remanded*, 515 U.S. 1154, 115 S. Ct. 2604 (1995), *on remand*, 62 F.3d 1233.

assert *jus tertii* to maintain causes of action on behalf of younger students, for years after graduation from high school. This procedural invitation by Petitioners could prove more troubling for the nation's schools than perhaps even the substantive issues proferred to this Court.

C. There Is No Basis to Revive Damage Claims in this Matter.

The School District respectfully asserts the trial and appellate courts properly ruled the School Officials and School District board members named as individuals had qualified immunity to any 42 U.S.C. § 1983 damage claim. The first question is whether the plaintiff alleged facts which, if true, would constitute a deprivation of a constitutional right at all. *Cole*, 228 F.3d at 1101, App. A at A15; *see Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982) ("*Harlow*"); *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 1714 (1998) ("*County of Sacramento*"); *Wilson v. Layne*, 526 U.S 603, 609, 119 S. Ct. 1692 (1999) ("*Wilson*"); *B.C.*, 192 F.3d at 1265, 1268. Second, unless there is a violation of a "clearly established" right which any reasonable person would have known at that time, a school official has qualified immunity and cannot be held accountable for damages. *Cole*, 228 F.3d at 1101, App. A at A15; *see Wilson*, 526 U.S. 603; *Brewster v. Board of Educ.*, 149 F.3d 971, 976-977 (9th Cir. 1998) ("*Brewster*"); *B.C.*, 192 F.3d at 1268; *McDade v. West*, 223 F.3d 1135, 1142 (9th Cir. 2000).

1. There Was No Potential Deprivation of Constitutional Rights in These Circumstances.

Pursuant to the first prong of the applicable *County of Sacramento* test, the School District respectfully asserts this matter could not involve a deprivation of a constitutional right at all, within the First Amendment "contours of the right." *County of Sacramento*, 523 U.S. 833 at 841, n.5. This Court has consistently expressed the need for particular Establishment Clause vigilance in K-12 public schools. *Edwards v. Aguillard*, 482 U.S. 578, 583-84, 107 S. Ct. 2573 (1987) ("*Edwards*"); *Lee*, 505 U.S. at 592. This Court, in two bedrock decisions, held that State-sponsored prayer during the school day impermissibly violates the Establishment Clause of the First Amendment. *School Dist. of Abington v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963) ("*Abington*"); *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261 (1962) ("*Engel*"). Following *Abington* and *Engel*, this Court has consistently disallowed other forms of public religious expression in the context of public schools. *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192 (1980) (posting of the Ten Commandments on classroom wall impermissible); *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479 (1985) (moments of silence for meditation or voluntary prayer during class impermissible); *Edwards*, 482 U.S. 578 (law requiring teaching of creationism in public schools impermissible). In *Lee*, 505 U.S. at 587, this Court declined the opportunity to abandon this thirty years of precedent, and the basic tripartite test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971) ("*Lemon*"), to reaffirm reliance upon precedent when reviewing public school Establishment Clause issues. *Lee*, 505 U.S. at 587. This Court specifically noted in *Lee* that "our decisions in *Engel v. Vitale* . . . and *Abington v. Schempp* . . . require us to distinguish the public school

context [from other civil ceremonial occasions]." *Id.* at 597 (citations omitted). Just last term this Court reaffirmed these bedrock public school principles in *Santa Fe Indep. Sch. Dist.*

All controlling precedent from this Court (and the circuits) has disallowed religious prayer, or similar forms of religious speech or exercises, in official public school-sponsored activities.[10] The Ninth Circuit decision in *Cole* carefully applied this Court's decisions in *Lee*, *Santa Fe Indep. Sch. Dist.*, and both the "endorsement" and "coercion" variations of the *Lemon* test to affirm Respondents' qualified immunity. *Cole*, 228 F.3d at 1101-1105, App. A at A14-A23. There is no reason for this Court to take this matter now.

2. There Was No "Clearly Established" Right During the Time Period At Issue.

The second prong of the *County of Sacramento* test provides the ultimate ground for denying the Petition. In this case, there was no established constitutional right of which the individually named defendants *should have known at that time*. In *Wilson*, 526 U.S 603, this Court held that

---

10. The School Officials also had a compelling State interest in compliance with the California Constitution, Article I, Section 4; Article XVI, Section 5; and Article IX, Section 8 during public high school graduation ceremonies. *Sands v. Morongo Unified Sch. Dist.*, 53 Cal. 3d 863, 809 P.2d 809, 281 Cal. Rptr. 34 (1991), *cert. denied* 505 U.S. 1218, 112 S. Ct. 3026 (1992) (no religious invocations delivered by clergy during graduation ceremonies); *Bennett v. Livermore Unified Sch. Dist.*, 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987) (no religious invocations by students during graduation ceremonies).

although the plaintiff's rights under the Fourth Amendment were violated by federal law enforcement officials, the officers were nonetheless entitled to the defense of qualified immunity since the state of the law was not clearly established at the time the search took place. *Wilson*, 526 U.S. at 605-606. This Court in so ruling followed its previous reasoning in *Harlow*, and also looked to the definition of "clearly established" articulated in *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987) ("*Anderson*"); *Wilson*, 526 U.S. at 614. In *Anderson*, this Court held "clearly established" for the purposes of qualified immunity means that:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent. *Anderson*, 483 U.S. at 640 (citations omitted).[11]

---

11. *See Brewster*, 149 F.3d at 976-980 ("The legal right at issue is not the generic right to free speech"); *B.C.*, 192 F.3d at 1265, 1288 (claimed constitutional deprivation must be apparent at the time of the alleged deprivation to be actionable); *Baxter by Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 736-737 (7th Cir. 1994) ("The plaintiff bears the burden of showing that the constitutional right allegedly violated was clearly established before the defendant acted or failed to act"); *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992) ("[government] [o]fficials are not liable for bad guesses in gray areas").

The School Officials' decisions were in compliance with the First Amendment Free Speech Clause's *Hazelwood* standards, and were dictated by the line of federal and state Establishment Clause decisions barring State-sponsored religious expression in school. There was no U.S. Supreme Court or federal circuit case law setting forth any right to deliver a sectarian or proselytizing religious expression in a graduation ceremony. If this is arguably a case of first impression involving proposed religious expression in educator-approved student graduation speech, there could be no official knowledge of a "clearly established" federal constitutional right *at that time* sufficient to abrogate the qualified immunity. *Harlow*, 457 U.S. 800; *County of Sacramento*, 523 U.S. 833; *Wilson*, 526 U.S 603; *Anderson*, 483 U.S. 635; *see Brewster*, 149 F.3d 971; *B.C.*, 192 F.3d at 1268. In the context of immunity to damage claims, the question is not whether the Establishment Clause required the action, it is whether the School Officials with advice of counsel reasonably believed at that time their conduct was lawful. As this Court stated in *Wood v. Strickland*, 420 U.S. 308, 319-320, 95 S. Ct. 992 (1975): "the imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students." Since there can be no damages due Petitioners, there is no reason for this Court to grant review to render what would truly be an advisory opinion.

D. The Contours of the Right for First Amendment Free Speech Analysis Must Include *Hazelwood*, Which Permits Administrative Limitations on Speech.

Petitioners attempt to side-step *Hazelwood* in their First Amendment "questions presented." Even assuming arguendo this Court found the School Officials' decisions were not required by the Establishment Clause as sought by the Petitioners, and that the decisions were not reasonable "good faith" attempts to comply with the Establishment Clause as found by the appellate court, those findings would not reverse the trial court's ruling that the School Officials were immune pursuant to Free Speech Clause and *Hazelwood* standards. Petitioners utterly fail to recognize their "questions presented" to this Court must include the *Hazelwood* standards for the purpose of Free Speech Clause analysis.

Students' First Amendment rights to free speech are protected to a more limited degree than adults in public schools. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733 (1969) ("*Tinker*"). Petitioners below grounded their Free Speech claims upon *Tinker*. However, this Court in *Tinker* noted that case did "not concern speech or action that intrudes upon the work of the schools *or the rights of other students*." *Id.* at 508 (emphasis added). *Tinker* recognized the special nature of public schools gives rise to "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 507; *cf. Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159 (1986) ("*Bethel*") (sanctions permissible for lewd and indecent student speech). This Court next differentiated between

student political protest and student expression in school-sponsored activities, holding that educators do not violate the First Amendment when exercising control over style and content of student speech in faculty-supervised activities so long as the educator's actions are "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. Speech sponsored by the school is thus subject to "greater control" by school authorities than speech not so sponsored. *Id.* at 272-73.[12] Thus, one affirmative defense of the Respondents below was that the School Officials' decisions were permissible pursuant to *Hazelwood*, 484 U.S. 273.

---

12. Petitioners attempt to buttress their First Amendment "questions presented" by citing School District policy 5145.2 regarding student expression. *Petition* at 2-4. Such a policy is required by California Education Code section 48907 and concerns student expression in official publications. *See id.* California Education Code section 48907 has been construed by a state appellate court to allow the "prior restraint" of student expression in a student-produced film. *Lopez v. Tulare Joint Union High Sch. Dist.*, 34 Cal. App. 4th 1302, 40 Cal. Rptr. 2d 762 (1995) ("*Lopez*"). The state appellate court in *Lopez* concluded that "official school publications" in California fall into the limited forum category, and that the prior restraint could be justified by advancing a "compelling state interest." *Id.* at 1328-29. Further, a state appellate court in *Perumal v. Saddleback Valley Unified Sch. Dist.*, 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 (1988) ("*Perumal*"), rejected the application of California Education Code section 48907 and "prior restraint" principles to the school district's prohibition of the distribution of religious literature on a "closed forum campus." *Perumal*, at 78-82, Crosby, J., dissenting. The state appellate court in *Bennett*, 193 Cal. App. 3d 1012, did not address any "prior restraint" issues when ruling student-delivered religious invocations unconstitutional on the grounds of the federal and state constitutions. There is no reason to bring these issues of California statutory and decisional law to this Court.

The School District's faculty advisors and School Officials' declarations attest to their ongoing duty to supervise and assist student speakers, as well as reasonable pedagogic concerns that speech be lawful, appropriate for the decorum of the graduation ceremony, and nonoffensive to the entire audience. *SER* at 36-38, 45-47, 48-50, 52-53, 54-56. The trial court correctly applied controlling First Amendment Free Speech Clause law and ruled the School Officials had a reasonable and legitimate pedagogical concern in not approving the proposed proselytizing valedictory testimonial in the context of a graduation celebration. *SER* at 253-257, App. C at C14-C17. The *Hazelwood* standards as applied to graduation ceremonies would therefore be included within any legal analysis involving the Free Speech Clause. However, there is no demonstrable need for this Court to address this settled law, and the Petition should again be denied.

E. Petitioners' Proposed Student Right to "Religious Invitation" Was Not Raised Below and is Contrary to Public School Precedent.

Petitioners suggest that this Court consider student "... preaching and religious invitations as fully protected First Amendment free speech activity...." *Petition* at 15. The First Amendment's Establishment Clause is applied with special vigilance in public schools. *Lee*, 505 U.S. 577. Petitioners' suggestion regarding State-sponsored public high school graduation ceremonies runs contrary to *Lee*, *Santa Fe Indep. Sch. Dist.*, and over thirty years of this Court's public school precedent. This sweeping legal theory of a student's "right to religious invitation" was not raised below at either the trial or appellate levels, where Petitioners relied instead upon *Tinker* and "viewpoint discrimination" theories.

Nor was it raised by petition for rehearing or rehearing en banc. Respondents respectfully assert this Court should not consider it now. *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319, 119 S. Ct. 1961 (1999) (argument was neither raised nor considered below, and Court declines to consider it); *N.C.A.A. v. Smith*, 525 U.S. 459, 470, 119 S. Ct. 924 (1999) (Court will not decide in the first instance issues not decided below); *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253-54, 119 S. Ct. 685 (1999) (Court expressed no opinion as to the factual correctness of new claims and instead left resolution to courts below on remand).

The line of cases now relied upon by Petitioners are not on point to K-12 public schools. *Petition* at 13-15.[13] Further, this line of reasoning ignores the reality that school audiences are compelled by law, or are at least invited by the State to activities involving peer pressure to attend, observe, or participate. *Lee*, 505 U.S. at 592-593, *Santa Fe Indep. Sch.*

---

13. No case involves compulsory attendance or audiences gathered by the State in K-12 public schools. In *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900 (1940), plaintiffs challenged a Connecticut statute that prohibited the solicitation of money for religious, charitable, or philanthropic causes without the approval of the State's Secretary of the Public Welfare Council. In *Fowler v. Rhode Island*, 345 U.S. 67 73 S. Ct. 526 (1953), plaintiffs were found guilty of violating a city ordinance for addressing a religious meeting in a public park. Neither *Cantwell* nor *Fowler* were cited to the Ninth Circuit. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510 (1995) ("*Rosenberger*"), involved religious university students' access to university facilities and publications on a nondiscriminatory basis. Petitioner did raise *Rosenberger* regarding "viewpoint discrimination," but never asserted a high school student's "right to religious invitation."

Dist., 120 S. Ct. at 2280. Access cases such as *Rosenberger*, 515 U.S. 819, bear no resemblance to graduates and parents assembled for a public high school graduation ceremony under the plenary control of the School District. In both school contexts[14], and nonschool contexts,[15] this Court has

---

14. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 68 S. Ct. 461 (1948) (compulsory legal attendance at school creates captive audience); *Bethel*, 478 U.S. at 684 (Court noted in pertinent part that: "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children — *especially in a captive audience* — from exposure to sexually explicit, indecent, or lewd speech") (emphasis added); *Edwards*, 482 U.S. at 584 ("[s]tudents in such institutions [public schools] are impressionable and their attendance is involuntary") *accord*; *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1541 (7th Cir. 1996) (students as captive audience justifies predistribution review of student leaflets); *Berger v. Rennselaer Cent. Sch. Corp.*, 982 F.2d 1160 (1993) (no distribution of Gideon Bibles to captive audience of students—distinguishing *Widmar v. Vincent*, 454 U.S. 263 (1981)); *Collins*, 644 F.2d 759 (invalid policy of prayer at school assemblies).

15. *Hurley v. Irish-American Gay & Lesbian & Bisexual Group*, 515 U.S. 557, 115 S. Ct. 2338 (1995) (right to speak encompasses right not to speak); *Lehman v. Shaker Heights*, 418 U.S. 298, 94 S. Ct. 2714 (1974) (upholding ban on political advertisements in rapid transit cars); *Frisby v. Schultz*, 487 U.S. 474, 487-88, 108 S. Ct. 2495 (1988) (upholding antipicketing ordinance involving a doctor held "captive" in his residence due to picketing on a public street outside his home); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 771, 772-73, 114 S. Ct. 2516 (1994) (upholding injunction against loud picketing involving patients held captive by circumstances of medical treatment); *Rowan v. U.S. Post Office Department*, 397 U.S. 728, 738, 90 S. Ct. 1484 (1970) (addressee may elect not to receive further material from a particular sender because "no one has a right to press even 'good' ideas on an unwilling recipient"); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 98 S. Ct. 3026 (1978) (upholding administrative order directed against broadest of scatological monologue).

consistently respected the rights of "captive audiences" to be free from intrusive speech. This Petition presents no factual or legal grounds for this Court to now consider Petitioners' sweeping change in the First Amendment as applied to the nation's public schools — particularly when the matter is procedurally limited to the reimposition of damage claims against the School Officials for allegedly violating a preexisting "clearly established" right.

CONCLUSION

The Petitioners have asserted no ground in either case law or policy to grant review. The Graduates' legal theories, if adopted, would discard settled public school precedent from this Court and the federal circuits, thereby sweeping away decades of substantive and procedural jurisprudence. Equitable disputes would continue long after an alumni has graduated from high school. 42 U.S.C. § 1983 damage litigation would escalate from either supporters or opponents of student religious testimonials, witnessing, or preaching in official public school events. Educators caught in the middle between competing claims would be at constant risk of personal liability when either exercising permissible pedagogic judgment pursuant to the Free Speech Clause, or enforcing the limitations of the Establishment Clause, for the benefit of all students and parents.

Respectfully submitted,

CHRISTIAN MARK KEINER
Counsel of Record
MICHELLE CANNON
LAURA LEE BRIGGS
ANNE SHERLOCK
GIRARD & VINSON
Attorneys for Respondents
1006 Fourth Street
Eighth Floor
Sacramento, CA 95814-3326
(916) 446-9292